NO. 13-20-00143-CV

IN THE COURT OF APPEALS

THIRTEENTH APPELLATE DISTRICT OF TEXAS

CORPUS CHRISTI-EDINBURG, TEXAS

DIANA GARZA, Appellant
v.

JOSE OCHOA, Appellee

Appeal from the 105th District Court of Kleberg County, Texas,
Cause No. 18-417-D
The Hon. Jack W. Pulcher, Presiding Judge

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

As he did in the trial court, Ochoa stubbornly refuses to read correctly or understand the declaration of Diana Garza's neighbor, Teresa Caldera. He states at least twice that she does not state how often she walked by Ochoa's property. [Ape brief pp. 18-19; 25] The declaration plainly states that she went walking every night by Ochoa's house. "For years leading up to Diana Garza's car accident, I would go walking every night and would walk by Jose Ochoa's house. For roughly three years leading up to the accident there were three dogs that Mr. Ochoa owned that would run from his house, up his driveway, and out to the road every time I walked or drove by. For years these dogs did this to pretty much everyone that walked or drove by and it was a constant nuisance in the neighborhood. There was no fence that kept the dogs from running out into the road, and I never saw him make any effort to restrain the dogs on his property or keeping [sic] them from

running at large off of his property." [CR 28]

INTRODUCTION

Appellee Ochoa writes wistfully of Texas' proud "free range" heritage for livestock, then conflates livestock with domestic dogs and cats as "domestic animals" in the remainder of his Brief. He then misstates–or only half states–the rule of law that his entire argument is based upon. The other half of this rule actually supports Diana Garza's contention that Ochoa had an existing common law duty to restrain these particular unruly dogs under these particular circumstances. Appellant Garza does not contend for a "pan-Texas" rule that all dog owners must restrain all their dogs at all times. Rather, she contends that existing Texas common law negligence principles imposed a duty on Ochoa to render safe a dangerous situation that he or his dogs (with his imputed knowledge) created. These arguments will be detailed below.

ARGUMENT AND AUTHORITIES

"[I]f a party negligently creates a [dangerous][1] situation, then it becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby."

El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex.1987), quoting from *Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109, 110 (1942).

I. Texas law imposes a duty to restrain an unruly dog.

Appellee Ochoa spends several paragraphs extolling the Texas "free range" tradition and attempts to apply that to domestic dogs. Dogs are not livestock subject to the Stock Laws, however, so the analogy is not an apt one. See Tex. Agric. Code §1.003(3), which does not include dogs in the definition of "livestock."

The Texas Supreme Court has never considered the question whether the "free range" traditions apply to unrestrained dogs that cause traffic accidents by being at large in a roadway. Appellee suggests

[1] The original quote in *Buchanan* contained the word "dangerous" but the

that a passage from *Clarendon Land, Inv. & Agency Co. v. McClelland*, 23 S.W. 576, 577 (Tex. 1893)[2] indicated that the Court would apply the same rules to unrestrained dogs in the road. There are two major flaws in this position. The first is that the passage is *dicta*, not being essential to the decision in the case. The second is that the *McClelland* Opinion was written in 1893. The automobile had not been invented, and probably not even envisioned by anyone not named Ford, Daimler or Benz. Likewise, modern paved highways which allow safe, high-speed travel by motor vehicles had also not been invented or envisioned, as there was no need for them. Thus the idea of an at-large dog running onto a highway in front of an automobile traveling at 60 miles per hour was simply inconceivable at that time.

But the common law is not static. Our Supreme Court has stated that "the common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution. "*El Chico Corp. v.*

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word was somehow omitted when the *El Chico* court quoted from *Buchanan*.

[2]"The owner of a dog may, as a general rule, permit him with impunity to run at large; but if he know him to be vicious, and does not restrain him, he is liable for any injury he may inflict upon person or property; and it would seem that the same principle should apply to the owner of any domestic animal known to him as being accustomed to break through an ordinarily good and sufficient fence."

Poole, 732 S.W.2d 306, 310 (Tex.1987) "Our courts have consistently made changes in the common law of torts as the need arose in a changing society." *Id*.

Until the digital revolution, perhaps no invention had so radically changed society in so many ways as the automobile. Today we think nothing of driving 70 miles per hour on a superhighway, whereas that would have been inconceivable to anyone in 1893, when the only means of travel were a steamboat, a train, a horse or one's own two feet.

Ochoa takes the position that Texas common law only requires an owner to restrain his dog if the owner knows that the dog is vicious or aggressive. However, the cases upon which he relies and quotes in his Brief go beyond mere viciousness or aggression and encompass the type of behavior of Ochoa's dogs in this case.

Ochoa quotes *Dunnings v. Castro*, 881 S.W.2d 559, 563 (Tex.App.-Houston [1st Dist.] 1994, writ dism'd) and *Searcy v. Brown*, 607 S.W.2d 937, 941 (Tex.Civ.App.–Houston [1st Dist] 1980, no writ) for the following:

> The owner of a domestic animal is not liable for injuries caused by it in a place where it has a right to be, unless the animal is of

> known vicious propensities or the owner should know of the vicious ***or unruly*** nature of the animal. (Emphasis added)

Searcy v. Brown, 607 S.W.2d at 941, quoting *Lewis v. Great Southwestern Corporation*, 473 S.W.2d 228, 230 (Tex.Civ.App.-Fort Worth 1971, writ ref'd n. r. e.).

Ochoa's dogs may not have been shown to be vicious or aggressive, but the evidence plainly shows they were unruly. The description of their behavior in the Caldera declaration outlines a classic case of unruliness. "For roughly three years leading up to the accident there were three dogs that Mr. Ochoa owned that would run from his house, up his driveway, and out to the road every time I walked or drove by [which was daily]. For years these dogs did this to pretty much everyone that walked or drove by and it was a constant nuisance in the neighborhood. There was no fence that kept the dogs from running out into the road, and I never saw him make any effort to restrain the dogs on his property or keeping [sic] them from running at large off of his property." [CR 28]

Webster's New World College Dictionary [4th Ed. 2004] defines "unruly" as "hard to control, restrain, or keep in order; disobedient,

disorderly, etc." The behavior of Ochoa's dogs fits the definition perfectly.

The cited cases are not outliers, and are not limited to dog attacks, as contended by Ochoa. In *Lewis v. Great Southwestern Corporation*, cited above, the rule was invoked when a goat in a petting zoo at Six Flags butted a woman from behind, causing her to fall and sustain injuries. *Id.* at 229-230. Because there were no previous instances of the goats being unruly or causing injuries, the trial court rendered a directed verdict for the amusement park, and the court of appeals affirmed. *Id.* at 231.

In *Am. Express Co. v. Parcarello*, 162 S.W. 926, 927–28 (Tex. Civ. App.—El Paso 1913, writ ref'd) suit was brought by the surviving wife and children of Peter Parcarello against the American Express Company for wrongful death. "The deceased received the injuries from which death ensued by being thrown from a wagon in which he was sitting on Main street in the city of Houston, when one of the defendant's wagons, driven by one of its employés, came in contact therewith. It was averred that the mules drawing the wagon were

headstrong, hard-mouthed, unbridlewise, unruly, and uncontrollable; that the defendant was negligent in employing said mules in drawing its wagons, knowing them to be of the character and disposition described, or of which it would have known by the exercise of ordinary care." The trial court charged the jury that "if you shall believe from a preponderance of the evidence that the mules driven by Thrift were of an unruly and uncontrollable disposition, and were known to be so by defendant, American Express Company, or would have been known to be so by said company by the exercise of ordinary care" and if the collision which resulted in Parcarello's death "was due to unruly and uncontrollable conduct on the part of one of said mules," the jury should find for the plaintiffs. *Id.* at 928. The jury found for the plaintiffs, and the court of appeals affirmed.

Numerous cases that do involve dog bites invoke the "vicious ***or unruly*** nature" dichotomy in deciding whether to impose liability on the owner. These include *Smith v. Province*, 2019 WL 1870105, at *3, *4 (Tex. App.—Amarillo 2019, no pet.); *Bowman v. Davidson*, 2015 WL 3988675, at *7 (Tex. App.—Texarkana 2015, no pet.)(Noting that

whether a dog has a vicious or unruly nature and whether the owner is aware of that nature are questions of fact, which in the instant case would have precluded summary judgment.); *Jones v. Gill*, 2005 WL 503182, at *4 (Tex. App.—Fort Worth 2005, no pet.); *Rodriguez v. Haddock*, 2003 WL 1784923, at *2 (Tex. App.—Fort Worth 2003, no pet.) and *Stakes by Anthony v. Waits*, 1989 WL 27306, at *2 (Tex. App.—Houston [1st Dist.] 1989, writ denied)(not designated for publication).

The Texas Supreme Court has repeatedly declared:

> ...if a party negligently creates a [dangerous][3] situation, then it becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby.

El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex.1987), quoting from *Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109, 110 (1942). The Supreme Court has repeated and relied upon this rule in *Dugger v. Arredondo*, 408 S.W.3d 825, 828 (Tex. 2013); *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 405 (Tex. 2009); *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995); *Otis Eng'g Corp. v. Clark*,

668 S.W.2d 307, 312–13 (Tex. 1983); and *Abalos v. Oil Dev. Co. of Tex.*, 544 S.W.2d 627, 633 (Tex. 1976).

This Court has also stated and relied on this rule in *In re Butt*, 495 S.W.3d 455, 465, fn. 6 (Tex. App.—Corpus Christi 2016, no pet.); *San Benito Bank & Tr. Co. v. Landair Travels*, 31 S.W.3d 312, 320 (Tex. App.—Corpus Christi 2000, no pet.); *Alamo Lumber Co. v. Pena*, 972 S.W.2d 800, 805 (Tex. App.—Corpus Christi 1998, pet. denied); *Roberson v. McCarthy*, 620 S.W.2d 912, 914 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); and *Bolin v. Tenneco Oil Co.*, 373 S.W.2d 350, 357, fn. 5 (Tex. Civ. App.—Corpus Christi 1963, writ ref'd n.r.e.).

This concept is not new, but rather is firmly enshrined in Texas law.

"The Restatement (Second) of Torts § 518 addresses the liability for harm caused by domestic animals that are not abnormally dangerous. The comment to that section states:

> **Animals dangerous under particular circumstances.** One who keeps a domestic animal that possesses only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies."

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[3] The original quote in *Buchanan* contained the word "dangerous" but the word was somehow omitted when the *El Chico* court quoted from *Buchanan*.

Dunnings v. Castro, supra, 881 S.W.2d at 562.

Ochoa created a dangerous situation by failing to fence or otherwise restrain his unruly dogs. He is charged with knowledge of their routine, daily habit of running out into the road every time a car drives by. Having created, or allowed the creation of, a dangerous situation with his unruly dogs, it became his duty to "do something about it" to prevent foreseeable injury to others such as Diana Garza. That duty was to take whatever steps were reasonably necessary to keep his unruly dogs out of the road. This is not an unreasonable burden, but the consequences of failing to discharge it were catastrophic for Diana Garza.

II. The livestock cases cited by Appellant were decided under common law negligence principles.

Appellee claims that the livestock cases cited by Appellant Garza which were decided under common law negligence principles somehow were not. He claims that *Warren v. Davis*, 539 S.W.2d 907 (Tex. Civ. App.—Corpus Christi 1976, no writ) was decided under a county stock law. That is false. The Opinion states that the plaintiff sued for

violation of the Stock Law of Matagorda County "and, alternatively, 'that this occurrence is of such character that it would not ordinarily occur in the absence of negligence...'" *Id*. at 909. This Court later stated that: "Since we hold that there was evidence of common law negligence, we do not discuss the issues of either negligence per se, or negligence under the doctrine of res ipsa loquitur" which would have been raised under the Stock Law. The case was decided under general common law negligence principles without regard to the Stock Law. *Id*.

In *Weaver v. Brink*, 613 S.W.2d 581, 582 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.), the plaintiff sued for negligence for the defendant's failure to maintain his fences, and also alleged that the defendant was guilty of negligence per se "in knowingly allowing the cow or cows to roam unattended on the highway in violation of Article 6971a VATS." The court decided the case under common law negligence principles without ever mentioning the statute again, much less discussing it or how it applied to the case.

Fuller v. Graham, 2000 WL 34410006 (Tex. App.—Corpus Christi 2000, no pet.) was also decided under common law negligence

principles. No state law or local Stock Law is even mentioned in the Opinion, much less discussed. *Id.* at *2.

The instant case was also brought under common law negligence principles, and under those principles and Appellant Garza's summary judgment evidence Defendant Ochoa's no-evidence motion for summary judgment should have been denied. This Court should reverse the summary judgment and remand the case for trial.

III. The duty urged by Garza is not for all dog owners in Texas, just those with unruly dogs that run into the road.

Ochoa makes broad, sweeping statements about the duty that Texas law places–or should place–upon him. He speaks of a "pan-Texas" duty that would burden all dog owners and take away the freedom of choice of Kleberg County voters. These fervid imaginings are overwrought.

The duty urged by Garza herein is merely the duty to keep one's unruly dogs out of the road to avoid creation of a dangerous situation for drivers. It is a duty already imposed by local ordinances on the vast majority of dog owners, since the majority of Texans live within the

limits of a town, city or county that has enacted an ordinance prohibiting owners from allowing their dogs to run at large.

Moreover, this duty does not apply to all owners of all dogs–only to owners whose unruly dogs present a predictable and preventable hazard to the driving public. The legal sky will not fall if this Court recognizes this duty in this case.

IV. This Court has not shied away from recognizing new tort duties to the driving public in the past.

Ochoa argues that this Court cannot create or recognize a duty to keep an unruly dog out of the road because the Legislature and Kleberg County have failed to enact dog-restraint laws which would provide the basis for such liability. This same argument was made to this Court in *Evans v. Joleemo, Inc*., 714 S.W.2d 394, 396 (Tex. App.—Corpus Christi 1986), aff'd sub nom. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987). In rejecting that argument this Court stated: "The fact that Texas has not enacted so-called dramshop legislation does not mean that persons operating such establishments are immune from well-accepted and long-standing principles of common law. Such legislation

would clarify and codify the law on liability of operators of dramshops; however, lack of such legislation simply requires the courts to deal with the subject in their traditional fashion through case-by-case decision and analysis." *Id*.

That is what Diana Garza asks this Court to do once again. One of the well-accepted and long-standing principles of Texas common law is that if a party negligently creates a dangerous situation, then it becomes his duty to do something about it to prevent foreseeable injury to others. *Dugger v. Arredondo*, 408 S.W.3d 825, 828 (Tex. 2013); *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 405 (Tex. 2009). Ochoa negligently created a dangerous situation by allowing his unrestrained dogs to habitually run into the road every time a vehicle passed his property. He is presumed to know the habits of his dogs, since they had done this daily for at least three years before the accident. He therefore had a duty to restrain his unruly dogs for the safety of the driving public. Imposing duties for the safety of the driving public is not a new or radical concept for this Court.

"Our courts have consistently made changes in the common law of

torts as the need arose in a changing society." *El Chico Corp. v. Poole*, supra, 732 S.W.2d at 311 (listing prior Supreme Court cases expanding tort liability "in response to needs of modern society"). This Court recognized a duty to the driving public in *Evans v. Joleemo, Inc.*, 714 S.W.2d at 396 "under general common law principles..." The Supreme Court affirmed that decision. The duty urged by Garza herein is but an extension of that duty to the driving public.

Ochoa claims that recognition of this duty would thwart the will of the voters of Kleberg County; however, there is no evidence that those voters have weighed in on the subject one way or the other. He also suggests that an election is the only way that Kleberg County could enact a dog restraint ordinance. That is not the case. Tex. Health & Safety Code § 826.033 (a) provides:

> "The governing body of a municipality and the commissioners court of a county may adopt ordinances or rules under Section 826.014 [counties] or 826.015 [cities] to require that:
>
> (1) each dog or cat be restrained by its owner;

There is no requirement for an election to authorize such ordinances.

V. Ochoa also violated the duty of a landowner abutting a highway to not jeopardize the safety of persons using the highway.

A more specific example of the general duty to do something about a dangerous situation that the actor has created is the duty of an owner of property abutting a highway to exercise reasonable care not to jeopardize the safety of persons traveling on the highway. *Atchison v. Tex. & P. Ry. Co.*, 186 S.W.2d 228, 229 (Tex. 1945); *Alamo Nat. Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *Skelly Oil Co. v. Johnston*, 151 S.W.2d 863, 865 (Tex. Civ. App.—Amarillo 1941, writ ref'd). In *Atchison v. Tex. & P. Ry. Co.*, smoke from a grass fire on the railroad's property obscured a highway and resulted in a traffic accident. The railroad was held liable.

This Court recognized, discussed and applied this duty in *Silva v. Spohn Health Sys. Corp*., 951 S.W.2d 91, 95 (Tex. App.—Corpus Christi 1997), writ denied, 960 S.W.2d 654 (Tex. 1997).

One of the cases relied upon by this Court in *Silva* was *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343, 350 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), a case with remarkably

similar facts. There, a nursing home adjacent to a highway had a longtime resident who "suffered from vascular insufficiency, schizophrenia, senility, non-psychotic brain syndrome, confusion and a tendency to wander." *Golden Villa,* 674 S.W.2d at 346. Over time, she suffered an increasing state of confusion and an increased tendency to wander, and had previously wandered onto the highway. The nursing home staff was fully aware of these facts. *Id*.

One day the patient darted on to the highway and collided with a motorcyclist, causing injuries to both. The motorcyclist and the patient's daughter sued the nursing home for failure to provide proper care and supervision for its patient. After stating the rule and discussing the leading cases thereon, the court held:

> [The patient] constituted a clear and present danger to travelers ***who would swerve or otherwise attempt to avoid hitting her if she was on the highway***. Appellant, by its failure to keep [the patient] from wandering onto Highway 35, breached the duty it owed to [the motorcyclist] and this breach was the proximate cause of [the motorcyclist's] injuries.

Id. at 350 (emphasis added)

No less than the patient in *Golden Villa*, Ochoa's dogs constituted a clear and present danger to travelers ***who would swerve or***

otherwise attempt to avoid hitting them if they were on the highway. Ochoa is charged with knowledge of his dogs' tendencies to run into the road when a motor vehicle approached. This had been a daily occurrence for at least three years. It was entirely foreseeable that a motorist would swerve or otherwise try to avoid hitting Ochoa's unruly dogs, just as it was foreseeable that a driver would swerve to avoid hitting the patient in *Golden Villa*. Because the types of injuries suffered by Diana Garza were entirely foreseeable, Ochoa had a duty to keep his dogs out of the road. Ochoa's breach of that duty directly and proximately caused Garza to swerve to miss the dogs and crash, resulting in serious injuries. Because Garza produced more than a scintilla of evidence on each of the challenged elements, it was error for the trial court to grant Ochoa's no-evidence motion for summary judgment. This Court should reverse that judgment and remand this case for trial.

PRAYER

WHEREFORE Appellant Diana Garza respectfully prays that the no-evidence summary judgment below be REVERSED and that the

cause be REMANDED for further proceedings and trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief contains 3,768 words, excluding the items listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Randall E. Turner

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Appellant's Brief was served upon the following counsel for Appellee Jose Ochoa by e-service through the Pro Doc e-Filing service and e-File Texas in accordance with the Texas Rules of Appellate Procedure, this 5th day of October, 2020:

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